

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 7851 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

DR KAILASHBEN NINAMA JUNIOR LECTURER IN P & SM - Petitioner
Versus

GUJARAT UNIVERSITY & 3 - Respondent(s)

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Appearance :

MR MB GANDHI for Petitioner No(s).: 1.

MR SUNIL M AGRAWAL for Petitioner No(s).: 1.

MRS VD NANAVALI for Respondent No(s).: 1.

NOTICE SERVED BY DS for Respondent No(s).: 2,4.

MR SUNIL S JOSHI for Respondent No(s).: 3.

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date : 20/07/2005

CAV JUDGMENT

1. Dr. Kailashben Ninama, petitioner, has filed this petition under Article 226 of the Constitution of India with a prayer that this Court may be pleased to issue a writ of mandamus and appropriate order or direction in the nature of mandamus holding and declaring that the petitioner is eligible for getting admission in Post Graduate Course (P.G. Course for short) in the subject of Preventive and Social Medicine (hereinafter referred to as "P&SM") for the vacant seat of general category being a candidate of Scheduled Tribe category. He has further prayed that the Selection Committee has wrongly refused admission to the petitioner though the petitioner has secured more than 40% marks which is required for S.T. Candidates. It is further prayed that the Selection made by the Selection Committee not to select the petitioner be declared as illegal and void and this Court may be pleased to direct the Selection Committee – respondent No. 2, to give admission to the petitioner on one seat of P.G. Course in the subject of P&SM and the candidate of the other University to whom admission is given be declared as illegal and void and the same be cancelled.

2. The said petition was filed on 27.4.2005. Initially, this Court issued notice on 4.5.2005 and also passed an order that the admission, if any, would be subject to the final result of the present petition and the order that may be passed by this Court hereinafter. Thereafter, on 13.5.2005 this Court passed an

order and thereafter on 17.6.2005 this Court issued Rule. Ms. V.D. Nanavati, learned advocate, appears for respondent Nos. 1 and 2.

2.1 Mr. M.B. Gandhi, learned advocate for the petitioner, has filed Civil Application No. 4667 of 2005 on 13.6.2005 for joining two students as party respondent Nos. 3 and 4 who have been given admission in respect of the same subject with respondent No. 2. In view of the same, the said application was allowed vide the order passed by this Court on 17.6.2005 and one Ms. Vaishali P. Shah and Mr. Hirenkumar Govindlal Doshi were joined as respondent Nos. 3 and 4 respectively.

2.2 In view of the order of the learned Chief Justice on 13.7.2005, the matter has been placed before this Court for hearing on 14.7.2005.

3. I heard Mr. M.B. Gandhi, learned advocate for the petitioner and Ms. V.D. Nanavati, learned advocate for respondent Nos. 1 and 2 as well as Mr. Sunil Joshi, learned advocate for respondent No. 3.

FACTS OF THE PETITIONER'S CASE:

4. The learned advocate for the petitioner has invited my attention to the

basic facts in this case as under:

4.1 The learned advocate has stated that the petitioner is serving as Junior Lecturer since last four years and she belongs to S.T. Category. The petitioner got degree of M.B.B.S. In the year 1999 and thereafter the petitioner completed internship for a period of one year and soon thereafter in the year 2000 the petitioner got job as a Junior Lecturer in the subject of P & SM. The petitioner is continuously serving on the post of Junior Lecturer since the date of her joining i.e. From 29th December, 2001.

4.2 The learned advocate for the petitioner further submitted that in the year 2005 the petitioner appeared in the competitive examination for admission to the P.G. Medical Course held by Gujarat University. As per the result declared on the notice board of the Gujarat University petitioner got 167.50 marks in the open test and as per the Rules and Regulations framed by the University the marks of 1st, 2nd and 3rd M.B.B.S., together with the marks obtained in the open test are consolidated and the list of candidates appeared in the open category is prepared and such list was published by the University.

4.3 So far as the petitioner is concerned the name of the petitioners appeared in the said list at 539 i.e., the merit number of the present petitioner and so far as

Registration number is concerned, the registration number of petitioner is 344. A copy of the said list has been produced by the petitioner along with this petition.

4.4 The learned advocate for the petitioner submits that so far as the Rules are concerned, for the purpose of P.G. Course the Gujarat University has framed Rules vide O.M.D. 14 (Ordinance Doctor of Medicine) and O.M.S. 14 (Ordinance Master of Surgery). These are the Rules for eligibility criteria of the candidates for getting admission to the P.G. Course. The said Rules are the Rules governing admission to the P.G. Degree and Diploma Medical Courses other than M.Ch. & D.M., at the affiliated Medical Colleges/Institutions from 1.1.2004. The learned advocate for the petitioner has invited my attention to Rule 1.8 which reads as under:

“1.8 A candidate has to appear in Competitive examination for admission to Post Graduate medical courses (M.D./M.S. Diploma) held by Gujarat University and should have to secure 50% marks in entrance test (for reserve category 40%)”

4.5 The learned advocate for the petitioner has further submitted that the petitioner had filled in form for both the categories namely for open category as well as for ST category. It is the case of the petitioner that when the petitioner

was first called at that time petitioner had the preference for getting the admission on the reserved category seat for Post Graduation. However, at that time the petitioner was informed by the Select Committee that so far as NHL College is concerned, there is no seat reserved for ST Category in the course of P&SM and therefore, the petitioner had no option and the petitioner being a ST candidate did not get the preference in SC or SEBC or OBC category and therefore the petitioner had to wait for the general category seats and accordingly the petitioner as again called on 19th April, 2005 for interview.

4.6 It is the case of the petitioner that when the petitioner was called for interview on 19th April, 2005 there were two seats vacant for the P.G. Course in P&SM subject one seat was for general category and the other seat on SEBC converted into open category as no candidate of SEBC category was available and therefore, there were two vacant seats in open category for the post of Graduate Course in P &SM. The moment the petitioner found that there is a vacancy and in the open category also as she is entitled to get admission and therefore the petitioner accepted the admission in P.G. Course for P&SM. However, when preference was indicated by the petitioner, the Select Committee observed that it is a general category seat and unless and until 50% marks are obtained by the candidate the said seat cannot be offered.

4.7 The petitioner, at that time, submitted that the petitioner belonged to ST category and therefore passing level for the petitioner is 40% in the competitive examination and not 50% as per Rule 1.8. Therefore, on that seat of the passing at 40% the petitioner is eligible to have the seat even in the open category. However, that was refused and the petitioner was refused admission.

4.8 In view of the aforesaid peculiar facts and circumstances of the case, it is the case of the petitioner that though the petitioner is entitled to the reserved seat even then the Select Committee has not offered the same and therefore injustice is done to the petitioner.

4.9 Being aggrieved and dissatisfied with the aforesaid action, the present petition has been filed by the petitioner.

4.10 The learned advocate for the petitioner has argued the matter at great length. The petitioner has also filed rejoinder dated 12.5.2005 on which learned advocate for the petitioner has relied on. The learned advocate has raised a number of contentions which he has raised in the petition.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:

4.11 The learned advocate for the petitioner submitted that the interpretation of Rule 1.8 done by the Committee that for the purpose of getting admission in the general category a candidate of reserved category is also required to obtain 50% marks is totally incorrect interpretation. He submitted for getting admission 50% marks for general category is not meant but when the seat is of general category a candidate belonging to general category is required to obtain 50% marks but the candidate belonging to reserved category is required to obtain only 40% marks and can compete for the seat in the general category and that the marks are not comparable and therefore, the entire Rule has been misinterpreted and hence the present petition has been filed.

4.12 The learned advocate for the petitioner has invited my attention to Rule particularly Rules 1.8, 2.0, 2.1, 4.1, 4.2, 5, 5.1, 5.2, 5.5(a) & (b), 7.2, 7.3, 7.12, 15, Rule on page 21 i.e. Regulation under Rule 7.6 – Regulation 11. He has also invited my attention to the representation made by the petitioner dated 22.4.2005.

4.13 The learned advocate for the petitioner has also submitted that the seats of P&SM are available both in the Civil Hospital as well as in the NHL College and the petitioner being a Junior Lecturer in the subject of P&SM and was getting admission in NHL College in P.G. Course in the subject of P&SM and the

petitioner is seeking to the vacant seat of P&SM subject in NHL Medical College.

4.14 The learned advocate has also relied on Article 16 of the Constitution of India which reads as under:

“Art. 16 – Equality of opportunity in matters of public employment -

Clause (1) – There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State .

Clause (2) – No citizen shall, on grounds only of religion, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State .

Clause (3) – xxxxxxxxxxxx

Clause (4) – Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State”.

4.15 The learned advocate for the petitioner has stated that the interpretation of the University is clearly incorrect and in support of the same, he has relied on

the judgement of the Hon'ble Supreme Court in the case of HARIDAS PARSEDIA VS. URMILA SHAKYA AND OTHERS reported in (2000) 1 SCC 81 particularly para 17.

4.16 He has also relied on the judgement of the Hon'ble Supreme Court in the case STATE OF M.P. VS. NIVEDITA JAIN reported in AIR 1981 SC 2045 particularly para 26.

4.17 The petitioner has also filed Civil Application No. 4668 of 2005 on 13th June, 2005 with a prayer that this Court may be pleased to direct the respondents to allot the vacant seat in NHL Medical College as per Annexure-A to the petition. The University has filed reply on 7.7.2005. The said Civil Application was allowed by this Court on 14.7.2005.

ADDITIONAL CONTENTION ON BEHALF OF THE PETITIONER AS PER THE AMENDMENT:

4.18 In the said Civil Application by way of amendment, the petitioner/applicant contended that as per Rule 15 she is entitled to get admission. That the two seats falling into general category were allotted to two persons who have already been joined as party respondents by a separate

application, namely, Ms. Vaishali P. Shah and Mr. Hirenkumar Govindlal Doshi. Out of the said two candidates the second candidate Mr. Hirenkumar Govindlal Doshi has not applied for registration nor did he pay fees and therefore his admission has been cancelled and according to the latest position as on 24th May, 2005, on the aforesaid reason one seat has also become vacant and the same is shown in the proforma published by the respondent. A copy of the same is produced by the petitioner at Annexure-F by way of amendment. According to Annexure-F again a vacancy has arisen in the concerned subject of P&SM (degree) and same is allotted to NHL Medical College. Though it is designated as SEBC seat but looking to the entire select no candidate of SEBC category is available to occupy the seat and according to the Rules and Regulations of the University it is open for the University to give admission to a claimant though belonging to ST category. The present applicant belongs to ST category and the petitioner is also since last four years serving as Junior Lecturer in the same subject of P & SM and therefore the present applicant claims a right over the said seat. It is also further submitted that as per the interim order, this Court has given direction to the University that admissions are subject to the result of the petition. In the aforesaid background, the present applicant can be allotted to said seat as per Annexure-F and accordingly the petitioner/applicant prayed that this Court be pleased to direct the respondents to allot the vacant seat in the NHL Medical College as per Annexure-A to the petition.

SUBMISSIONS AND CONTENTION ON BEHALF OF RESPONDENT NOS. 1 & 2 i.e., on behalf of Gujarat University by Mrs. V.D. Nanavati:

5. On behalf of respondent Nos. 1 and 2 Ms. V.D. Nanavati, learned advocate, appears. She has also relied on the affidavit dated 11.5.2005 of Mineshbhai S. Shah, the Registrar of the respondent Gujarat University as well as another affidavit dated 13.5.2005. The learned advocate for the University has invited my attention to the said affidavit filed by the University. On the basis of the said affidavit the learned advocate has made the following submissions:

5.1 The learned advocate for the respondents submits that there are different subjects in which Post Graduation Courses in Medical is available under Gujarat University. The seats of Post Graduate Courses in different disciplines are conducted in two centers, namely, (i) N.H.L. Municipal Medical College and (ii) B.J. Medical College. The admission to PG Courses in Medicine by Gujarat University is conducted as per the MCI (Medical Council of India) Regulations. It was further submitted that Gujarat University as per Rules O.M.D. 14 and O.M.S. 14 framed for PG Courses conducted open entrance test. As per the Rules framed by the Gujarat University, any student seeking admission to a general category seat has to secure 50% marks in the entrance test and any reserved

category student seeking admission to the reserved category seat has to secure 40% marks in the entrance test.

5.2 It is submitted that in the year 2005 for the PG Course in the discipline of Preventive and Social Medicine , two seats were available in N.H.L. Medical College and three seats were available in B.J. Medical College. As per the subject wise roster maintained by the individual Institute in the year 2005 out of two seats of N.H.L. Medical College, one seat was reserved for S.E.B.C. (Socially and Educationally Backward Class) and one seat was open. Similarly, out of three seats of B.J. Medical College, one seat was reserved for ST candidate and two seats were reserved for open category students. In the year 2005, the petitioner secured 41.87% marks in the entrance examination. As the petitioner belonged to Scheduled Tribe category, the petitioner was eligible for admission to ST category seats on the basis of her performance in the entrance examination. In the year 2005, ST seat as stated above, was available in B.J. Medical College.

5.3 The learned advocate further submitted that during the counselling for admission as per Rule 7.6 which provides for the sequence of interview for selection and admission will be as per Regulations, the petitioner was offered ST seat in B.J. Medical College and the learned counsel has produced the form by

which the petitioner was offered seat in the B.J. Medical College where the petitioner has declined to take admission in ST category and thereafter the authority has stated that her claim for ST category seat has been withdrawn. The said form along with application filed by certain students is placed before this Court and the same is taken on record. Therefore, the fact remains that the petitioner has refused to take admission in B.J. Medical College in S.T., category seat.

5.4 The learned advocate for the University has further submitted that in fact this fact has been suppressed by the petitioner in the present petition. The learned counsel therefore submitted that this Court may reject the petition solely on this ground and declare that the petitioner is not entitled to any equitable relief as she has suppressed material facts from this Court. She has not come to this Court with clean hands.

5.5 The petitioner, after leaving this opportunity, thereafter, insisted for admission only in N.H.L. Medical College. Since no ST reserved category seat was available in N.H.L. Medical College, the petitioner opted for admission in open category. Since she had obtained 41.87% marks in the entrance examination, she was not eligible for admission in the open category seats. The eligibility fixed by the University as per Rule 1.8 is based on the category of seats

to which admission is sought by the student. A reserved category student when seeks admission to a general category seat, has to obtain 50% marks in the entrance test. It is submitted that the petitioner on the basis of her performance in the entrance examination is therefore not eligible for admission in the open category seat in the subject of P&SM. The learned counsel therefore submitted that the petition is not maintainable and the petitioner has no right to seek a writ from this Court for admission to the course. In any view of the matter, the petitioner is not entitled to admission to the said course.

5.6 The learned advocate further submitted that in any view of the matter, the petitioner cannot get relaxation of getting admission in the open category seat by securing only 40% marks in the entrance examination. The learned advocate further submitted that the candidate once opts for open category, she/he shall secure 50% of marks to become eligible for admission in the open category. It was submitted that the candidate who is belonging to SC/ST/SEBC (Reserve Category) opting for admission in the open category shall have to secure the eligible 50% marks; but that candidate cannot get admission in open category by securing less than 50% of marks and cannot get the relaxation on the basis that she/he is belonging to SC/ST/SEBC (Reserve Category).

5.7 The learned counsel has further relied on the judgement of the Hon'ble

Supreme Court in the case of GURU NANAK DEV UNIVERSITY VS. PARMINDER KR.BANSAL reported in AIR 1993 SC 2412 where the Hon'ble Supreme Court has held that admissions to educational institutions cannot be ordered by means of interim directions without regard to the eligibility of the candidates.

5.8 The learned counsel has also relied on the judgement of the Hon'ble Supreme Court in the case of R.K. SABHARWAL VS. STATE OF PUNJAB reported in AIR 1995 SC 1371.

5.9. Alternatively, the learned counsel for the respondent University further submitted that in any view of the matter, the admission process by the Gujarat University was completed by 20.4.2005. She has also invited my attention to the fact that respondent No. 3, who has been given admission, was given admission on 21.4.2005. The learned counsel submitted that as per the decision of the Hon'ble Supreme Court in the case of MEDICAL COUNCIL OF INDIA VS. MADHU SINGH AND OTHERS reported in (2002) 7 SCC 258 in which it is held that a schedule of admission to the PG Course is framed by the Medical Council of India. As per the schedule, the admission to post graduation courses has to be completed before 1st May. In view of the same, the petitioner is otherwise not entitled to admission to the said course. The learned counsel has

relied on para 23 of the said judgement on page 272 in which the Hon'ble Supreme Court has given its conclusion as under:

- (i) there is no scope for admitting students midstream as that would be against the very spirit of statutes governing medical education;*
- (ii) even if seats are unfilled that cannot be a ground for making admission.*
- (iii) xxxxxxxxxxxx*
- (iv) MCI shall ensure that the examining bodies fix a time schedule specifying the duration of this course, the date of commencement of the course and the last date for admission*
- (v) different modalities for admission can be worked out and necessary steps like holding of examination if prescribed, counselling and the like have to be completed within the specified time;*
- (vi) no variation of the schedule so far as admissions are concerned shall be allowed;*
- (vii) in case of any deviation by the institution concerned, action as prescribed shall be taken by MCI".*

5.10 The learned counsel has further relied on the judgement of the Hon'ble

Supreme Court in the case of MRIDUL DHAR VS. UNION OF INDIA reported in AIR 2005 SC 666 particularly para 32 on page 680 which reads as under:

“Having regard to the professional courses into consideration, it deserves to be emphasized that all concerned including Governments, State and Central both, MCI/DCI, colleges, new or old, students, Boards, Universities, examining authorities, etc., are required to strictly adhere to time schedule wherever provided for; there should not be mid-stream admission; admission should not be in excess of sanctioned intake capacity or in excess of quota of any one, whether the State or Management. The carrying forward of any unfilled seats of one academic year is also not permissible.”

5.11 In paragraph 35 on page 681 of the said judgement, directions have been given. Direction 12 states that the time schedule for grant of admission to postgraduate courses shall also be adhered to. Direction 15 states that time schedule provided in Regulations shall be strictly adhered to by all concerned failing which defaulting party would be liable to be personally proceeded with.

5.12 The learned counsel has also relied on the judgement of this Court in the

case of PIYUSH HARSHADRAI DESAI VS. UNION OF INDIA reported in 2004(2) GLR 1687 particularly paragraph 44 on page 1706 where in similar circumstances this Court has rejected the petition for admission after considering the judgement of the Hon'ble Supreme Court in MADHU SINGH's case (supra).

REPLY OF UNIVERSITY AGAINST THE PETITIONER'S ADDITIONAL
CONTENTION BY WAY OF AMENDMENT:

5.13. As against this, the University has filed affidavit in reply dated 7.7.2005. Ms. V.D. Nanavati, learned counsel for the University has relied on Rule 5.5 of the Post Graduate & Diploma Medical Courses which reads as under:

“5.5 (a) In case, the seats reserved under Rule 5.0 remain vacant due to non-availability of the candidates of the specified category upto Rule 4.2 selection, they shall be treated as unreserved seats and will be filled up by the candidates on the basis of merit from those who are eligible as per Rule 4.1 & 4.2.

5.5(b) Of these, unfilled seats will be subsequently re-reserved after operation of Rule 4.2 and if some seats remain vacant due to non-

availability of candidates from Merit List of reserved candidates, these will be again unreserved after operation of Rule 4.3.”

5.14. The learned advocate for the University has submitted that as per said Rule 5.5 the petitioner is not eligible to get admission in the subject of P & SM degree. It was submitted that two vacancies had arisen in the seat of P & SM. Two candidates have been admitted against the vacancy from the open category. Out of two candidates, one candidate did not join the course. It was further submitted that however, in spite of the aforesaid position, the petitioner is not entitled to be admitted because the said vacancy arises out of the quota of SEBC seats. It was submitted that due to non-availability of candidate belonging to SEBC/specified category, the seats are to be treated as unreserved and are to be filled by the candidates from the open category who are eligible under Rules 4.1 and 4.2.

5.15. It was further submitted that unfilled seats of the open category will be subsequently reserved for SEBC category after operation of Rule 4.2. If some seats remained vacant due to non-availability of the candidate from the merit list of the reserved categories then it will become unreserved after operation of Rule 4.3. It was further submitted that the petitioner is not entitled to get admission under Rule 15 of the Rules. Rule 15 of the said Rules reads as under:

“Rule 15 – After P.G. Interviews, remaining vacancy, if any, remains in non-clinical subjects in the concerned department/Medical college then the same subject be offered to the Tutor of the concerned department/Medical college those who have applied for the same on the basis of merit of their MBBS marks. Priority should be given to regular conformed Tutors (non-clinical subjects include – Anatomy, Physiology, Bio-chemistry, Pharmacology, Microbiology, Forensic Medicine and Preventive & Social Medicine)”.

5.16 After relying upon the said Rules, it was submitted that the seat in P & SM degree course that fell vacant in N.H.L. Medical College is not filled in and has lapsed. No candidate is given admission under Rule 15. It was submitted that as per the Medical Council of India Guidelines, the last date for grant of admission was 30th May, 2005. It was submitted that no student much less the petitioner can be admitted after 30th May, 2005.

5.17 It was further submitted that the University has not received the application of the petitioner for granting registration under Rule 15 for Tutor in P & SM degree course after vacancies filling counseling which was conducted on

24th May, 2005, through her Head of Department and/or Dean, NHL Municipal Medical College.

5.18 It was further submitted that as per Rule 15 of the said Rules when the petitioner has failed to file application through her Head of Department and/or through Dean, NHL Medical College after counseling on 24th May, 2005 the University cannot entertain the application of the petitioner and the said seat has been lapsed.

5.19 It was further submitted that in view of the decision of the Hon'ble Supreme Court in the case of Medical Council of India Vs. Madhu Singh (supra), no departure from the Schedule as framed for admissions can be made by the authorities. It was further submitted that all the formalities for admission to the P.G. Course are concluded and this Court cannot grant any relief at this stage which would be granting admission in the midst stream which is justified according to the decisions of the Hon'ble Supreme Court. Therefore, the said additional contention by way of amendment may be rejected.

6. On behalf of respondent No. 3 Mr. Sunil Joshi, learned advocate appears and he also supports the case of the University. He has further submitted that respondent No. 3 has already got admission on 21.4.2005 and therefore this Court may not pass any order in favour of the petitioner by which admission of respondent No. 3 may be disturbed.

CONCLUSION AND FINDINGS:

7. I have considered the rival submissions. From the record it appears that the petitioner belongs to ST category. As per Rule 1.8 for entering the merit list, the petitioner has to obtain 40% marks. Her name was on select list. However in this case as indicated earlier the petitioner was offered ST category seat in B.J. Medical College where she declined said offer and therefore she has abandoned her right to ST category seat. Therefore the said claim of the petitioner was withdrawn qua the S.T., category seat. In view of the aforesaid facts and circumstances of the case, in fact, the University has not violated Rule 1.8. However, in fact, the petitioner gave up her right to claim the preference for ST category, so she has abandoned her right, and thereafter she had to claim admission in open category.

7.1A Once the petitioner abandoned her claim of reserved category seat then she has to compete in the open category and she has to obtain 50% or more marks for getting admission in the open category seat and in this situation the decision of the University not to give admission to the petitioner on the ground that the petitioner has not obtained 50% or more marks for getting admission is legal, valid in accordance with Rules and binding on the petitioner.

7.1B In view of the aforesaid discussion, in my view, when the University has declined admission to the petitioner as per Rule 1.8 particularly when the petitioner has earlier abandoned her right to admission in B.J. Medical College in reserved category seat and thereafter when she has contested for the open category and the University has refused admission to the petitioner as she has obtained less than 50% marks in the open category seat, the decision of the University is legal and valid.

7.1C The interpretation of Rule 1.8 of the Rules for getting admission in Post Graduate course as canvassed in the petition is ill-founded and without any basis. As per Rule 1.8 if candidate belongs to reserved category he/she is entitled to 40% marks. Thus, Rule 1.8 is in consonance with Article 16(4) of the Constitution of India. Rule 1.8 of the Rules which provides that a candidate secured 50% of marks in competitive examination, would be eligible for getting admission only for open category seats. Similarly, a candidate belonging to reserve category claiming admission to Post Graduate Medical course would not be eligible for admission in the open category seat if he/she secured less than 50% marks in the competitive examination but would be eligible for admission only in the Reserved Category seats. The aforesaid interpretation has been consistently followed not only in P.G. Course but also in under-graduate courses

as well as from decades together. The aforesaid interpretation has been accepted and admission is being granted on the aforesaid basis only. The candidate belonging to reserve category and secured more than 50% of marks and have the benefit of selection for admission in open category seats as well as reserve category seats; but a candidate belonging to unreserved category who has not secured 50% of marks would not get benefit of getting admission. Thus Rule 1.8 is not in violation of Article 16(4) of the Constitution of India .

7.2 Much reliance has been placed by the learned counsel for the petitioner on the judgement of the Hon'ble Supreme Court in the case of HARIDAS PARSEDIA Vs. URMILA SHAKYA AND OTHERS (supra). In that case the question of recruitment for appointment to the higher post in department was confined to only SC/ST candidates who compete for posts reserved for them in the hierarchy of departmental cadres. In that case from the facts stated, the Hon'ble Supreme Court has raised two questions which are at para 9 on pages 88-89 of the said judgement thus:

“(1) Whether any relaxation from general passing marks of 50% for each of the written test papers is permissible for SC/ST candidates when they compete inter se for being appointed to the reserved category posts of Transport Sub-Inspectors and when in such examination the general

category candidates are not competing

2.xxxxxx”

In that context, the Hon'ble Supreme Court in para 17 on pages 93-94 has observed as follows:

“As per the amended Recruitment Rules of 1985, Rule 11-A(2) clearly provides that, out of the vacancies reserved for ministerial service officers for being appointed to the post of Transport Sub-Inspectors, 16% vacancies would be reserved for Scheduled Caste and 20% for Scheduled Tribe candidates. It, therefore, becomes obvious that for direct recruitment by limited competitive examination to be undertaken by ministerial service candidates, total 36% posts would be reserved for SC/ST candidates. Meaning thereby, 64% of the posts would be available to the general category candidates. All these candidates belonging to ministerial service, whether being general category or SC/ST category, will have to appear at the departmental examination based on the same subjects and confined to the same syllabus. It is easy to visualise that if such posts are to be filled up by limited direct recruitment from the ministerial staff and the examination is held for filling up all 100% promotion posts comprised of the reserved as well as general category posts at a time, then SC/ST candidates would be entitled to 10% reduction of passing marks. On this aspect, there is no dispute between the parties. Meaning thereby, to appear at the same time at the

same examination, the general category candidates had to obtain 50% passing marks in each paper while the SC/ST candidates will be declared pass, if they obtain 40% or more marks in each of the papers in the very same examination. But this relaxation of marks, as contended, will not be available to SC/ST candidates, if at the departmental examination based on same subjects and same syllabus, they have no competition from general category candidates and the examination is confined only to the reserved category candidates. It is difficult to countenance this contention. Such a denial of relaxation will be ex facie discriminatory and arbitrary. It would also fly in the face of the established government policy of relaxation of 10% passing marks under Article 16(4) for such reserved category candidates. It is purely a fortuitous circumstance that the examination is confined only to the SC/ST candidates for being appointed to reserved posts comprising of 36% out of total available promotion posts and whereat general category candidates do not and cannot compete. Even when SC/ST candidates compete among themselves for the reserved category posts, they are required to pass the written examination. For them the passing marks remain the same i.e. 40% as compared to general category candidates for whom 50% passing marks are prescribed. This is the firm policy of the Government for the benefit of SC/ST candidates. It is easy to visualise that after passing such departmental examination, all of them will be absorbed in some higher cadre of Transport Sub-Inspector along with general category candidates. Secondly, in

our view it is patently erroneous to hold that the decision of the Government for relaxation of passing marks for SC/ST departmental candidates at the departmental examination can be applicable only when in such examination, the departmental candidates belonging to general category also compete with the SC/ST candidates and not otherwise. Holding general examinations for all types of candidates at a time or separate examinations for only SC/ST candidates for being appointed to the reserved posts on the one hand and for general category candidates on the other wherein SC/ST candidates can also compete for unreserved posts, is totally irrelevant for judging the efficacy of the relaxation policy. The general sweep of the policy decision already taken by the State of Madhya Pradesh under Article 16(4) cannot get diluted on the basis of such an irrelevant and fortuitous circumstance. Consequently, even the third objection raised by Shri Krishnamani against the appellants' contention cannot be sustained.”

7.3 This decision as indicated above is in peculiar facts and circumstance of the case and in that case only SC/ST candidates were involved and no other candidates were considered. In that light the observation made by the Hon'ble Supreme Court will not help the case of the petitioner. There no question of competing interest of reserved category with open category which is whether the Gujarat University is violating Article 16(4) of the Constitution of India..

7.4 The learned advocate contended that in any view of the matter the action of the University is contrary to Article 16(4) of the Constitution of India. In view of this submission made by him, I will have to consider his submission in the light of the principles laid down by the Hon'ble Supreme Court in this behalf.

7.5 For appreciating the aforesaid principle, I have to consider that Article 16(1) provides equality of opportunity in matters of public employment. It provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(2) provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. However, Article 16(4) provides that nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. It may be noted that Article 15(4) of the Constitution of India provides that nothing shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The same analogy is placed in Article 16(4) of the Constitution

of India which I have already quoted. The said Article 16(4) of the Constitution of India has been interpreted by the Hon'ble Supreme Court of India in the following cases:

7.5A The first decision which I consider is a nine Judge Bench of the Hon'ble Supreme Court in the case of INDRA SAWHNEY VS. UNION OF INDIA reported in AIR 1993 SC 477 popularly known as Mandal Commission. It may be noted that in the case of INDRA SAWHNEY AND OTHERS VS. UNION OF INDIA AND OTHERS (supra) (nine Judge Bench of the) Hon'ble Supreme Court has considered the provisions of Article 16(4) as well as Article 15(4) of the Constitution. It may be noted that the matter has been heard by nine Judge Bench and by a 6:3 decision the constitutionality, validity and enforceability of the order dated 13-8-1990, subject to certain conditionalities and prerequisites was upheld. Six separate judgements were handed down after hearing all the parties. The leading judgment is by the Hon'ble Mr. Justice B.P. Jeevan Reddy, (for Hon'ble the Chief Justice M.H. Kania, and Hon'ble Mr. Justice M.N. Venkatachaliah, Hon'ble Mr. Justice A.M. Ahmadi and himself) with Hon'ble Mr. Justice S. Ratnavel Pandian and Hon'ble Mr. Justice P.B. Sawant concurring by their separate judgements. The dissenting minority is constituted by Hon'ble Mr. Justice Dr. T.K. Thommen, Hon'ble Mr. Justice Kuldeep Singh and Hon'ble Mr. R.M. Sahai each one delivering his separate judgement.

7.5A(i) In the said leading judgement in para 57 on page 540 the Hon'ble Supreme Court has considered the question whether clause (4) of Article 16 is an exception. The Hon'ble Supreme Court has negated the same and observed as under: (the leading judgement)

"It had to be accepted that clause (4) is an instance of classification inherent in clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect is clause (4) an exception to clause (2), if "class" does not mean "caste". Neither clause (1) nor clause (2) speak of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit."

7.5A(ii) The Hon'ble Supreme Court has further observed on page 587 in para 122 of the said judgement as under:

“para 122(1) Article 16(4) is not an exception to Art. 16(1). It is an instance of classification inherent in Art. 16(1). Art. 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under clause (1) of Art. 16.”

7.5A(iii) I also rely on paragraph No. 456 at page 669 of the said leading judgement where Article 16(4) has been interpreted, paragraph No. 292 at page 619 where Article 16(4) has also been interpreted, paragraph No. 366 at page 631, paragraph Nos. 396 and 397 at page 643 and also paragraph No. 400 at page 644.

7.5B The Hon'ble Supreme Court in the case of AIIMS STUDENTS' UNION VS. AIIMS AND OTHERS reported in (2002) 1 SCC 428 (judgement delivered by R.C. Lahoti, J as he was then) at paragraph No. 58 on page 458 of the said judgement has also observed as follows:

“para 58 – The preamble to the Constitution of India secures, as one of its objects, fraternity assuring the dignity of the individual and the unity and integrity of the nation to “we the people of India”. Reservation unless

protected by the Constitution itself, as given to us by the founding father and as adopted by the people of India, is subversion of fraternity, unity and integrity and dignity of the individual. While dealing with the directive principles of State policy, Article 46 is taken note of often by overlooking Articles 41 and 47. Article 41 obliges the State inter alia to make effective provision for securing the right to work and right to education. Any reservation in favour of one, to the extent of reservation is an inroad on the right of others to work and to learn.”

The Hon'ble Supreme Court has further observed at paragraph No. 59 on page 461 has observed as under:

“The impugned reservation, obnoxious to merit, fails to satisfy the twin test under Article 14. Having taken a common entrance test, there is no intelligible differentia which distinguishes the institutional candidates from others; and there is no nexus sought to be achieved with the objects of AIIMS by such reservation. Can the Court sustain and uphold such reservation? “Justice is the earnest and constant will to render every man his due. The precepts of the law are these: to live honourably, to injure no other man, to render to every man his due” - said Justinian. Giving a man

his due, one of the basics of justice, finds reflected in right to equality. Mediocrity over meritocracy cuts at the roots of justice and hurts right to equality. Protective push or prop, by way of reservation or classification must withstand the test of Article 14. Any overgenerous approach to a section of the beneficiaries, if it has the effect of destroying another's right to education, more so, by pushing a mediocre over a meritorious, belies the hope of our founding fathers on which they structured the great document of the Constitution and so must fall to the ground. To deprive a man of merit of his due, even marginally, no rule shall sustain except by the aid of the Constitution; one such situation being when deprivation itself achieves equality subject to satisfying the tests of reason, reasonableness and rational nexus with the object underlying deprivation."

7.5C The recent judgement of Constitution Bench of the Hon'ble Supreme Court is in the case of E.V. CHINNAIAH VS. STATE OF A.P. AND OTHERS reported in (2005) 1 SCC 394, particularly paragraphs 31, 42, 82, 86 and 114. At para 31 on page 414 the Hon'ble Supreme Court has observed thus: (per majority)

"It is a well settled principle in law that reservation to a backward class is

not a constitutional mandate. It is the prerogative of the State concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which includes the Scheduled Castes, to reserve certain seats in educational institution under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State.”

7.5D Hon'ble Mr. Justice S.B. Sinha while concurring with the majority has made certain observations in paragraph Nos. 42 (pg. 418), 82 (pg. 426), 86 (pg. 427) para 114 (page 435).

7.5D(i) The above decisions of the Hon'ble Supreme Court throw much light on the interpretation of Article 16(4) of the Constitution of India.

7.5E In view of the various judgements of the Hon'ble Supreme Court which I have considered, the scope and content of Article 16(4) has been considered, the larger question raised by Mr. Gandhi, learned advocate for the petitioner, that when the petitioner has opted for general category and in that case the University ought to consider her marks at 40% and not 50% and if the University considers the marks at 50% then it is violative of Article 16(4) of the Constitution,

has no substance in view of what has been discussed by various judgements of the Hon'ble Supreme Court particularly in view of the recent judgement of the Hon'ble Supreme Court in the case of E.V. CHINNAIAH VS. STATE OF A.P. (supra) and hold that the decision of the University is in consonance with the principles laid down therein.

7.5F The said decision of the University is in consonance with Article 16(4) of the Constitution of India in view of the principles laid down by the Hon'ble Supreme Court in various judgements which I have discussed particularly the latest judgement of the Hon'ble Supreme Court in the case of E.V. CHINNAIAH VS. STATE OF A.P. (supra).

7.5G In view of the judgements of the Hon'ble Supreme Court, the contention of the learned counsel for the petitioner that the action of the University in refusing admission to the petitioner is violative of Article 16(4) of the Constitution of India cannot be accepted. The University has acted in accordance with the Rules for granting admission.

7.5H I also rely on Article 335 of the Constitution of India which provides claims of Scheduled Castes and Scheduled Tribes to services and posts where the Article has provided that the claims of the members of the Scheduled Castes

and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or State. Even in the leading judgement of the Hon'ble Supreme Court in the case of INDRA SAWHNEY VS. UNION OF INDIA (supra) the said Article has been considered by majority of the Hon'ble Apex Court and the Hon'ble Apex Court has observed that it is obvious that if the claims of even Scheduled Castes and Scheduled Tribes are to be taken into consideration consistently with the maintenance of efficiency of administration, the said admonition has to be respected equally while taking into consideration the claims of other backward classes and other weaker sections. (see para 8 on 505 of the said judgement) .

.Can petitioner obtain admission at this stage?

7.5-I As regards admission, the admission is already over on 20.4.2005. The petition has been filed on 27.4.2005 and ultimately the matter has been heard in the month of July, 2005. Even if contention of the petitioner is accepted, it will not be possible for this Court to grant relief by way of directing the Selection Committee to give admission to the petitioner on one seat of P.G. Course in the subject of P&SM and the candidate of other University to whom the admission is given and the same be cancelled.

7.5-J In any view of the matter, these directions cannot be granted in view of the categorical judgements of the Hon'ble Supreme Court in the case of Madhu Sing (supra) and Mridul Dhar (supra) which I have referred to earlier and the judgement of this Court in the case of PIYUSH HARSHADRAI DESAI VS. UNION OF INDIA (supra) . Therefore, the petitioner cannot be given admission at this stage and if this Court passes any order for giving admission to the petitioner, the same will be contrary to and inconsistent with the judgement of the Hon'ble Supreme Court in Madhu Singh's case (supra) and also other judgements. In view of the same, no relief is granted as claimed by the petitioner in this petition.

FINDINGS REGARDING ADDITIONAL CONTENTIONS OF PETITIONER

MADE BY WAY OF AMENDMENT:

8. I have considered the additional contention made by the petitioner by way of amendment. It is no doubt true that respondent No. 4 has been offered admission but he did not join and therefore the said seat has become vacant. In ordinary course the authority could have admitted the petitioner on the said seat but as indicated by the authority in para 7 of the reply and as per Rule 15 after filling, counseling which was conducted on 24th May, 2005 it was incumbent upon the petitioner to file proper application through her Head of Department

and/or through Dean, NHL Medical College to the University. If the petitioner would have done this, then the University is duty bound to consider the application of the petitioner in accordance with law and she would have got admission in this behalf. Unfortunately, the petitioner did not file the application and therefore the University did not offer admission to the petitioner.

9.. In view of the subsequent development the prayer of Mr. Gandhi, learned advocate that this Court may direct the respondent to allot the seat which is lapsed cannot be entertained on two grounds namely, (i) when the seat has become vacant and as per Rule 15, the petitioner did not file necessary application and therefore the University cannot be blamed and (ii) this Court cannot grant any relief in view of the judgement of the Hon'ble Supreme Court in the case of Madhu Singh (supra).

9A In view of the same, though this Court granted amendment but the additional contention raised by the petitioner by way of amendment cannot be accepted.

9B In view of the aforesaid discussion, it is no doubt true that on one hand one seat remained vacant and on the other hand this Court is not able to give admission to the petitioner. The Court is not able to give the relief to the petitioner on two grounds, namely (i) when the reserved quota seat was offered to the petitioner in B.J. Medical College, the petitioner did not accept that seat

and she missed that opportunity and thereafter tried her case in open category for which her mark was less than 50% and (ii) out of two persons who are offered seats, one person i.e., respondent No. 4 did not accept admission. At that time also as per Rule 5.5(a) and (b) and particularly Rule 15 which this Court has considered and as per Rule 15 the petitioner did not apply through proper channel before 30.5.2005 and therefore the authority could not consider the request of the petitioner in this behalf after 24.5.2005 till 30.5.2005. In view of the same, both times the petitioner missed the opportunity so that this Court is not able to give relief to the petitioner.

9C However, so far as the next question is concerned, what is the remedy?

“The central idea of my scheme, the details of which would have to be worked out, is to adopt measures which would put SC and ST children as near to children more favourably placed as circumstances permit. One of the most serious handicaps of SC and ST children is that their parents are obliged to increase the family income by making even very small children earn a small income by part time work, e.g., by selling newspapers. The time so taken up is withdrawn from studies and other activities of the school; a handicap from which children more fortunately placed are free. The compensatory measures to remove this handicap are: free education, free supply of text books and other school requisites; free supply of uniforms where prescribed. But to remove the temptation of SC and ST parents to make their children earn by part time work, it is necessary to provide a daily

stipend or grant for each SC and ST child which would leave him free to do school work and participate in other activities which are a part of education in schools. We must begin with the primary school, for the object of the scheme is not only to put SC and ST children on a level with others but to give them an opportunity of showing their talents and abilities.'"

(See: H.M. Seervai's Constitutional Law of India 4th Edition, Vol. 1, page 619 at para 9.291)

9D Secondly, I have usefully referred to the concurring judgement of the Hon'ble Mr. Justice S.B. Sinha of the Hon'ble Supreme Court in the case of E.V. Chinnaiah (supra) where at paragraph 114 on page 435 of the judgement the Hon'ble Judge has observed what is the remedy?. I would also like to rely on the said paragraph 114 at page 435 of the said judgement which reads as under:

"There is one practical aspect of the matter which may not also be lost sight of. The chart produced before us clearly shows that the members belonging to Relli and Adi-Andhra are hardly educated. What was necessary in the situation was to provide to them scholarships, hostel facilities, special coaching, etc., so that they may be brought on the same platform with the members of other Scheduled Tribes viz., Madiga and Mala, if not with the other backward classes. It is not in dispute that members belonging to Relli are hardly educated. Only 2% of the members of the said community have studied in secondary school. No one has ever been

admitted in any engineering discipline or other professional disciplines. The said facts clearly go to show that providing reservation for them in engineering or medical discipline or in public service would not solve their problem. Without such basic education, the members belonging to the said community would not be getting admission either in the engineering or medical colleges or other professional courses and as such the question of their joining public service may not arise at all. Now, even for the post of Class IV employees, qualification of passing matriculation examination is provided. Unless children of the said community are educated, the provision for both for education as also public service would be a myth for them and ultimately in view of the impugned legislation for all intent and purport, the benefit thereof would go to other categories. The State, in our opinion, should take positive steps in this behalf.”

(See: E.V. Chinnaiah Vs. State of A.P. & Others (2005) 1 SCC 394 – para 114 at page 435)

10. In view of the above, in the result, the petition is rejected with no order as to costs.

(K.M. MEHTA, J)

(pkn)